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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 212

METROMEDIA, INC., *Appellant,*

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellee,*

—and—

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

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METROMEDIA, INC., *Appellant,* —*against*— AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellee,* —and— UNITED STATES OF AMERICA	No. 212

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

Appellee American Society of Composers, Authors and Publishers ("ASCAP") moves pursuant to Rule 16 of the Rules of this Court:

(a) to dismiss the appeal sought to be prosecuted by appellant from the judgment of the United States District Court for the Southern District of New York denying appellant's motion (i) to hold appellee in con-

tempt for its alleged refusal to comply with Section IX of the Amended Final Judgment of March 14, 1950 in this action, or, (ii) in the alternative, to direct plaintiff United States of America to move the District Court to have ASCAP punished for contempt, on the ground that the Expediting Act does not confer jurisdiction on this Court over this appeal; or, in the alternative,

(b) to affirm, without further argument, the judgment of the District Court, on the grounds that appellant has no standing to move to have appellee punished for contempt and that, in any event, appellee is not in contempt of the Amended Final Judgment.

Jurisdiction, Questions Presented and Statement

The judgment of the District Court was filed on March 25, 1964.

Thereafter, appellant relying on § 2, Expediting Act, 15 U. S. C. § 29,* filed its notice of appeal to this Court. Appellant also prosecuted an appeal to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the District Court.

The judgment of the Court of Appeals was entered on March 8, 1965.

Concurrently with its jurisdictional statement, appellant has filed in this Court a petition for a writ of certiorari to review the judgment of the Court of Appeals.

To avoid duplication, appellee requests that the Court consider in support of this motion, appellee's brief in

*Section 2 of the Expediting Act provides:

"In every court action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." 32 Stat. 823 (1903), as amended, 15 U. S. C. § 29 (1952).

opposition to appellant's petition for a writ of certiorari which is being filed concurrently with this motion.

This motion presents the following additional question:

1. When a consent judgment in an antitrust suit brought by the United States has created private rights for the benefit of numerous non-parties, must this Court under the Expediting Act, entertain an appeal by a non-party, who has failed to follow the procedures expressly available to enforce its private rights, to review a determination by the District Court that: (a) such a non-party has no standing to move to have a party to the decree punished for contempt; and (b) the party to the decree is not in contempt.

Argument

I.

The Appeal Should be Dismissed

The decisions of this Court in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 371 U. S. 540 (1963) and 375 U. S. 39 (1963), amended, 375 U. S. 994 (1964) are directly in point and require dismissal of the within appeal.

In *Shenandoah,* a group of television broadcasters brought a proceeding in the District Court to compel ASCAP to issue a special kind of license pursuant to the Amended Final Judgment. The District Court found that the Amended Final Judgment did not require ASCAP to issue the kind of license demanded by the television broadcasters and dismissed their petition. The broadcasters appealed directly to this Court relying on § 2 of the Expediting Act.

On motion of appellee ASCAP, this Court dismissed the appeal for want of jurisdiction, 371 U. S. 540 (1963).

Thereafter, the Court of Appeals for the Second Circuit dismissed the appeal perfected there by the broadcasters from the District Court decision on the ground that all appeals were routed to this Court by the Expediting Act, 317 F. 2d 90 (2d Cir. 1963).

The broadcasters then petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals. This Court granted the petition and reversed the judgment of the Court of Appeals, 375 U. S. 39 (1963). This Court said (375 U. S. at 40):

> "The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. See 36 Cong. Rec. 1679 (1903). The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned. Compare *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17; *Aluminum Co. of America* v. *United States*, 302 U. S. 230."

The only difference between *Shenandoah* and the case at bar is that here appellant is seeking to use the device of a contempt proceeding, rather than the proceeding expressly made available to it by the Amended Final Judgment, to force ASCAP to issue the type of license desired by appel-

lant. But, here—as in *Shenandoah*—the District Court's order "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned."

The Court of Appeals in the case at bar held that § 2 of the Expediting Act did not require that appellant's appeal be made directly to this Court. After reviewing the history and the circumstances of the *Shenandoah* cases, the Court of Appeals concluded (341 F. 2d at 1007):

> "... Metromedia's motion for contempt evolves from a private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment."

Terminal R. R. Ass'n v. *United States*, 266 U. S. 17 (1924) does not require denial of appellee's motion. There the petitioner who was attempting to enforce the provisions of an antitrust decree by a contempt action was a co-defendant and a party to the decree.

II.

The Judgment of the District Court Should be Affirmed

If this Court does not dismiss this appeal, it should affirm, without further argument, the judgment of the District Court denying appellant's motion.

This appeal does not raise a substantial question warranting further consideration by this Court.

In support of appellee's motion to affirm, we incorporate here by reference appellee's brief in opposition to appellant's petition for a writ of certiorari to review the judg-

ment of the Court of Appeals in this action. For the reasons there stated, appellee's motion to affirm should be granted.

Conclusion

Appellee's motion to dismiss the within appeal or to affirm the judgment of the District Court without further argument should be granted.

Respectfully submitted,

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